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Supreme Court, U.S.
FILED
DEC 6 1994
OFFICE OF THE CLERK

No. 93-1841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,
v.
FEDERICO PENA, SECRETARY OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL, INC., NATIONAL BLACK CHAMBER OF COMMERCE, INC., NATIONAL ASSOCIATION OF MINORITY CONTRACTORS IN SUPPORT OF RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE RECORD IN THIS CASE DOES NOT PROVIDE AN ADEQUATE BASIS FOR THIS COURT'S REVIEW	5
A. The Record Does Not Establish Which Of At Least Three Different Federal Regulatory Programs Is At Issue	5
B. The Deficiencies In The Record Preclude Review Of The Questions Presented	12
II. THE SUBCONTRACTING COMPENSATION CLAUSE AND THE REBUTTABLE PRESUMPTIONS COMPORT WITH THE REQUIREMENTS OF THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT	14
A. This Court Should Apply Intermediate Scrutiny In Reviewing The Subcontracting Compensation Clause	14
B. Federal Contracting Programs For Socially And Economically Disadvantaged Individuals Satisfy Any Applicable Standard Of Equal Protection Review	17
1. Congress had ample evidence upon which to base its findings of discrimination in government contracting	17
2. Congressional authorization of DOT's use of the SCC and of the federal programs incorporated therein is necessary to accomplish and narrowly tailored to further the compelling governmental interest	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

California Bankers Association v. Shultz, 416 U.S. 21 (1974) 13
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ..... *passim*
Commonwealth of Massachusetts v. Painten, 389 U.S. 560 (1968) 13, 14
Flast v. Cohen, 392 U.S. 83 (1968) 13
Fullilove v. Klutznick, 448 U.S. 448 (1980) ..... *passim*
McClanahan v. Morauer & Hartzell, Inc., 404 U.S. 16 (1971) 13
Metropolitan Broadcasting Inc. v. FCC, 497 U.S. 547 (1990) ..... *passim*
Poe v. Ullman, 367 U.S. 497 (1961) 13
Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 13
Shaw v. Reno, 113 S. Ct. 2816 (1993) 14
Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) 13
Turner Broadcasting Systems, Inc. v. FCC, 114 S. Ct. 2445 (1994) 4, 26
Williams v. Zuckert, 371 U.S. 531 (1963) 14

STATUTES AND REGULATIONS

Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 ..... *passim*
13 C.F.R. Part 124 ..... *passim*
48 C.F.R. Part 19 ..... *passim*
49 C.F.R. Part 23 ..... *passim*
15 U.S.C. § 631 19
15 U.S.C. § 637 ..... 6, 7, 8, 28
15 U.S.C. § 644(g) ..... *passim*

MISCELLANEOUS

123 CONG. REC. 7156 (1977) 30
124 CONG. REC. S29641 (1978) 19
133 CONG. REC. H10774 (1987) 19
134 CONG. REC. H10052 & H10069 (1988) 19

TABLE OF AUTHORITIES—Continued

Page

134 CONG. REC. H10068 (1988) 19
The Meaning and Significance for Minority Businesses of the Supreme Court Decision in the City of Richmond v. J. A. Croson Co.: Hearing before the Legislation and National Security Subcommittee of the Committee on Government Operations, House of Representatives, 101st Cong., 2d Sess. (1990) 20
To Amend the Civil Rights Act of 1964: Permitting Minority Set-Asides: Hearing before the Committee on Governmental Affairs, United States Senate, S. Hrg. 933, 101st Cong., 2d Sess. (1990) 20
City of Richmond v. J. A. Croson: Impact Response: Hearing before the Subcommittee on Urban and Minority-Owned Business Development of the Committee on Small Business, United States Senate, S. Hrg. 1280, 101st Cong., 2d Sess. (1990) 20
Problems Facing Minority and Women-Owned Small Businesses, Including SBA Section 8(A) Firms, in Procuring U.S. Government Contracts: An Interim Report, H.R. Rep. No. 870, 103d Cong., 2d Sess. 20

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INTEREST OF THE AMICUS CURIAE

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote legally defensible minority business opportunity programs. MBELDEF is comprised of over 2,000 minority businesses nationwide, many of which, in their efforts to become successful commercial

enterprises, have benefited from federal, state, and local minority business opportunity programs. Additionally, MBELDEF has provided numerous state and local governments with legal guidance in the adoption of such programs and has participated in significant litigation concerning these programs.

The National Minority Supplier Development Council, Inc. ("NMSDC") is a nonprofit corporation founded in 1969 that seeks to provide minority business with access to purchasing opportunities in the public and private sectors. Currently, NMSDC has 46 regional offices and a national office that coordinates these efforts on a local and national level.

The National Black Chamber of Commerce, Inc. ("NBCC") is a nonprofit corporation, dedicated to the economic empowerment of African American communities through development of African American businesses, particularly manufacturing and construction. NBCC has 80 affiliated chapters throughout the nation.

The National Association of Minority Contractors ("NAMC") is a nonprofit corporation founded in 1969. During its 25 years of service, NAMC's goals have been to provide education and training to minority contractors, to promote the economic and legal interest of minority construction firms, and to bring equitable procurement and business opportunities to its membership.

These Amici Curiae have a significant interest in this Court's review of the substantial constitutional issues presented by this challenge to programs that benefit minority business enterprises.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises issues of great social and jurisprudential importance. Petitioner challenges the federal government's power to encourage the awarding of federal contracts to businesses owned by socially and economi-

[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

cally disadvantaged persons. Specifically, petitioner argues that the equal protection component of the Fifth Amendment invalidates longstanding federal efforts to assist disadvantaged persons because these programs incorporate rebuttable evidentiary presumptions that members of particular racial and ethnic groups suffer such disadvantage. Even such limited, remedial consideration of race, petitioner urges, is generally forbidden to the federal government.

These important issues should not be addressed in this case. *First*, and quite remarkably, petitioner has never identified which set of federal statutes and regulations it is attacking. At least three *different* sets of federal laws grant contracting preferences to businesses owned by socially and economically disadvantaged persons and are incorporated into the contract clause at issue here. The record does not reveal which program is at issue, and any one of the three might have led to the challenged preference. These programs differ in important respects, and those differences may make a critical difference in the constitutional analysis. Furthermore, because of this confusion, the Court would either have to affirm or invalidate *all* the programs, whether or not they are placed at issue by the facts, thus rendering what may well be an advisory opinion.

Second, the record does not indicate whether a presumption based on race is even at issue. Businesses can qualify as disadvantaged without any reliance on a racial presumption. The record does not establish whether the subcontractor at issue qualified by virtue of a racial presumption or by direct proof of disadvantage. Resolution of the question presented might well result in an advisory opinion for this reason as well.

If this Court reaches the merits, the decision below should be affirmed. Strict equal protection scrutiny should not apply here. Congress has substantial leeway—more leeway than is afforded the States—to make limited use of racial considerations to remedy disadvantages result-

ing from race discrimination. The federal programs at issue do not grant preferences on the basis of race. They grant unobjectionable preferences on the basis of social and economic disadvantage: both minority and non-minority individuals may qualify for statutory preferences. Each program uses race as a basis for a rebuttable presumption of disadvantage, but where that presumption is questioned, each program also places minority applicants for disadvantaged status on equal footing with non-minority applicants by requiring the *same proof* of economic disadvantage from each. Moreover, the contract clause at issue does not obligate private contractors to employ socially and economically disadvantaged subcontractors. It merely provides compensation to those who choose to do so. Thus, racial considerations play a carefully confined role in the overall scheme, and pose none of the risks that have required the application of strict scrutiny in other contexts.

There is ample support for Congress' judgment that such programs remain necessary to combat social and economic disadvantage. These federal laws, like all others, come to the Court with a presumption of constitutionality, and the record before Congress provides substantial evidence from which Congress could reasonably conclude that the challenged preferences remain necessary. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980). *Cf. Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445 (1994). Furthermore, a plethora of studies conducted in the wake of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), confirm the continuing pattern of discrimination at the state and local levels in all regions of the country—and thus reinforce the continuing need for contracting preferences for the socially and economically disadvantaged.

ARGUMENT

I. THE RECORD IN THIS CASE DOES NOT PROVIDE AN ADEQUATE BASIS FOR THIS COURT'S REVIEW.

Petitioner purports to challenge the use of racial preferences in the "Federal Construction Procurement Program." Petitioner's Brief ("Br.") at 5. No such "program" exists. The specific contract provision at issue in this case references at least three *different* federal regulatory schemes that provide preferences for subcontractors under three *different* sets of criteria that measure social and economic disadvantage. Petitioner never specifically identifies which regulatory scheme it is attacking, and the record does not establish which one applied here. Indeed, the record does not clearly establish that a *racial* preference is even at issue. Subcontractors may qualify for a statutory preference without any reliance on a racial presumption, and the record does not establish whether the subcontractor in this case did so.

A. The Record Does Not Establish Which Of At Least Three Different Federal Regulatory Programs Is At Issue.

The contract between the federal government and the prime contractor at issue contains a standard provision—the Subcontracting Compensation Clause ("SCC")—providing monetary compensation if the prime contractor awards subcontracts in excess of 10% of the prime contract amount to "small business concerns owned and controlled by socially and economically disadvantaged individuals." (J.A. 24-25).[2] Under the SCC, a sub-

[2] DOT's Federal Highway Administration ("FHWA") requires the use of the SCC in contracts for Construction of Roads and Bridges on Federal Highway Projects. *See* Defendants' Brief in Support of their Motion for Summary Judgment, Exhibit 1, at I-1 and I-24. The Central Federal Lands Highway Division ("CFLHD"), a regional office of FHWA, contracted with Mountain Gravel and Construction Company ("Mountain Gravel") for the federally funded construction of a stretch of highway in Colorado.

contractor may qualify as a Disadvantaged Business Enterprise ("SCC DBE") in at least four ways: [3]

> **(1) Section 8(d) SDB/MSB:** a "Small Disadvantaged Business" or "Minority Small Business" pursuant to the Small Business Act's Section 8(d) Minority Small Business Subcontracting Program, 15 U.S.C. § 637(d), and regulations set out at 13 C.F.R. Part 124, § 124.1 (portions, as noted, applying to Section 8(d) Subcontracting Program), and Subpart B, §§ 124.601-602, and the Federal Acquisition Regulations ("FAR"), which implement, *inter alia*, the Section 8(d) Program, 48 C.F.R. ("FAR") §§ 19.000-001 and §§ 19.702-703, when the business meets the standards for self-certification set forth therein ("Section 8(d) SDB/MSB"); [4] or
>
> **(2) STURAA DBE/MBE:** a "Disadvantaged Business Enterprise" or "Minority Business Enterprise" pursuant to the Department of Transportation's regulations governing recipients of DOT financial assistance, 49 C.F.R. § 23.5, the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA") Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145, and STURAA's implementing regulations at 49 C.F.R. § 23.6 ("STURAA DBE/MBE"), when certified as such by a state or other recipient of DOT funds; or

[3] The SCC is found at Section 108 of that contract, and was applicable to Mountain Gravel's subcontracting.

[3] The SCC reads as follows:

> A DBE shall mean a small business concern owned and controlled by socially and economically disadvantaged individuals as defined under the FAR Contract Clause 52.219-8 entitled "Utilization of Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals" or a woman owned business as defined under FAR Contract Clause 52.219-13.
>
> A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program.

(J.A. at 24).

[4] The CFLHD is subject to the Section 8(d) Subcontracting Program, *see* 15 U.S.C. § 637(d)(2), and is therefore governed by the eligibility requirements of that provision and its implementing regulations in the FAR.

> **(3) Section 8(a) SDB/MSB:** a "Small Disadvantaged Business" or "Minority Small Business" pursuant to the Small Business Act's Section 8(a) program, 15 U.S.C. § 637(a), and Section 8(a)'s implementing regulations at 13 C.F.R. Part 124 ("Section 8(a) SDB/MSB"), when certified as such by the Small Business Administration; or
>
> **(4) Other:** a small disadvantaged business enterprise pursuant to the certification process of a government agency, county, or city, when the contracting officer has determined the acceptable and viable nature of the particular certification program.[5]

Gonzales Construction Company ("Gonzales") received a subcontract from Mountain Gravel for which Adarand Constructors ("Adarand") was the low bidder because Gonzales had SCC DBE status. But nothing in the record establishes how Gonzales qualified. In particular, it does not show whether Gonzales provided proof of certification by the SBA, a city, a county, a municipal authority, the State of Colorado, or some other state, or whether he qualified through participation in the general Section 8(d)

[5] Petitioner acknowledges that CFLHD at least accepts certification of disadvantaged status based on some of the differing standards of these several regulatory schemes. *See* Br. at 8 n.7. In fact, CFLHD has a statutory and contractual obligation to comply with Section 8(d), and it has a contractual obligation to allow certification under category (4) above. An additional difficulty exists, however, as to the applicability of Section 8(d). Although the contract permits and the statute requires its applicability, the record contains conflicting indications as to whether CFLHD in fact accepts self-certification under the SCC. It is our understanding that a contractor may qualify by way of 8(d), but the issue is not entirely clear in this case.

Subcontracting Program. Thus, it is unclear which—if any—of the three federal preference programs incorporated into the SCC is at issue here. Indeed, petitioner cites indiscriminately to conflicting regulations from different schemes.[6]

The federal preference programs are similar in important respects. In each, a small business must be at least 51% owned and controlled by socially and economically disadvantaged individuals.[7] The definitions of social and economic disadvantage are also similar:

> Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice *or cultural bias* because of their identity as a member of a group without regard to their individual qualities.
>
> []Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.[8]

The three federal programs also afford members of particular racial and ethnic groups some presumption of

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[6] *See, e.g.*, Br. at 21 n.17 (making unsubstantiated and inaccurate assertions about SBA's treatment of race-based presumptions in the Section 8(a) and Section 8(d) programs); *id.* at 23-24 & n.19 (citing FAR regulations correctly and Section 8(a) regulations incorrectly).

[7] *See* STURAA, Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145; 49 C.F.R. § 23.62 (implementing STURAA); 15 U.S.C. § 637(a)(4) (Section 8(a) of the Small Business Act); 15 U.S.C. § 637(d)(3)(C) (Section 8(d) of the Small Business Act); FAR §§ 19.001, 19.703(a)(1), and 52.219-8 (FAR regulations implementing Section 8(d)).

[8] 15 U.S.C. § 637(a)(4)(C)(5) and (6)(A) (emphasis added). *See* FAR § 19.001 (FAR regulations implementing Section 8d; STURAA, Pub. L. No. 100-17, § 106(c)(2)(B) (adopting Section 8(d) and FAR implementing regulations' definition).

disadvantage.[9] Alternatively, disadvantaged status may be granted "on a case-by-case basis, [to] individuals who are not members of [a named minority group]," 49 C.F.R. § 23.62, such as disabled Vietnam veterans, Appalachian white males, Hasidic Jews, or any other individuals who demonstrate that they are socially and economically disadvantaged. 49 C.F.R. Pt. 23, Subpt. D., App. A (analysis of § 23.62).[10] In each federal program, applicants whose presumptive status is questioned[11] must offer the same proof of economic disadvantage as applicants who are not members of named minority groups. *See, e.g.*, 49 C.F.R. § 23.69; FAR § 19.703(a)(2). In the ultimate determination of economic disadvantage, therefore, each of the three programs treats minority and nonminority applicants identically. *See* 13 C.F.R. § 124.106(a); 13 C.F.R. § 124.106(b); 49 C.F.R. Pt. 23, Subpt. D, App. C.

These federal programs differ, however, in three ways that may have a critical bearing on this Court's constitutional analysis: (1) the basis for individual identification as a member of a named minority group; (2) the scope of the presumption of disadvantaged status based on named minority group membership; and (3) the procedures available for challenging presumptions of disadvantaged status.

Section 8(d). The pertinent regulations for Section 8(d) eligibility are as follows:

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[9] Groups may petition SBA to be certified and listed in the regulations as named minority groups. To prove that the group is socially disadvantaged, representatives must make an adequate showing that the group has suffered "chronic racial or ethnic prejudice or cultural bias." *See* 13 C.F.R. § 124.105(d); 49 C.F.R. Pt. 23, Subpt. D, Apps. A & C.

[10] *See also* 13 C.F.R. § 124.105(c); FAR § 19.703(a)(2) (citing 13 C.F.R. § 124.105(c)).

[11] That questioning may take the form of a third party challenge under STURAA or an investigation by SBA of 8(a) or 8(d) status. *See* 49 C.F.R. § 23.69(b)(1); 13 C.F.R. § 124.603(b); 13 C.F.R. § 124.111(c).

(1) *Identification*: Contractors may rely on written representations by a subcontractor regarding its status as a small disadvantaged business. 15 U.S.C. § 637(d)(3)(C) and (D); FAR §§ 19.000-001 and 19.703(a).

(2) *Presumption*: Contractors must presume that members of certain minority groups identified in the regulations ("named minority group(s)") are *both* socially *and* economically disadvantaged. 15 U.S.C. § 637(d)(3)(C) and (D); FAR §§ 19.000-001 and 19.703(a).

(3) *Challenges*: Although private parties may submit information to the federal contracting officer to try to persuade the officer to protest a subcontractor's Section 8(d) SDB/MSB status, a formal protest may only be initiated by the contracting officer or by the SBA. FAR § 19.703(a)(2); 13 C.F.R. § 124.603(b).

STURAA. The pertinent regulations for STURAA eligibility are as follows:

(1) *Identification*: The state must keep an annually-updated directory of certified businesses and make it available to bidders and proposers. 49 C.F.R. § 23.45(e).

(2) *Presumption*: A recipient must make a rebuttable presumption that members of named minority groups are *both* socially *and* economically disadvantaged for purposes of certifying businesses for STURAA DBE/MBE status. 49 C.F.R. § 23.62.[12]

[12] Despite the explicit statement by the statute and regulations that members of named minority groups must be presumed to be both socially and economically disadvantaged, STURAA, § 106(c)(2)(B) (relying on definition of socially and economically disadvantaged individuals in Section 8(d) of the Small Business Act and its regulations), 49 C.F.R. § 23.62 and App. A to Subpt. D, these regulations, at the same time, set forth a number of steps states must take in determining eligibility for STURAA DBE/MBE status. 49 C.F.R. § 23.45(f)(3). This litigation has failed to clarify whether these steps are to be applied only to those businesses that do not qualify for a presumption or whether the regulations are to some extent contradictory.

(3) *Challenges*: Any third party may challenge that presumptive status by submitting a challenge in writing to the state. 49 C.F.R. § 23.69(b)(1).

Section 8(a). The pertinent regulations for Section 8(a) eligibility are as follows:

(1) *Identification*: SBA makes a determination as to membership in a named minority group. *See* 13 C.F.R. § 124.105(b)(2).

(2) *Presumption*: The SBA may presume only that members of named minority groups are socially disadvantaged. 13 C.F.R. § 124.105(b). Even if presumed to be socially disadvantaged, an applicant for Section 8(a) eligibility must independently establish economically disadvantaged status. *See* 13 C.F.R. §§ 124.105(b) and 124.106.[13]

(3) *Challenges*: The SBA makes all determinations of eligibility. *See* 13 C.F.R. § 124.311(g). SBA will conduct a review of eligibility "upon receipt of specific and credible information" that a business no longer meets the requirements for economically disadvantaged status. 13 C.F.R. § 124.111(c).[14]

These differences in the three programs may be critical to this Court's constitutional analysis. A program that allows a self-certification of disadvantaged status poses different questions than a program that requires government certification. A presumption of both social *and* economic disadvantage may be more overinclusive than is a program that even initially requires proof of economic disadvantage. A program that allows any third party to

[13] In determining economic disadvantage, SBA makes a detailed assessment of factors in three categories: "The personal financial condition of the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets." 13 C.F.R. § 124.106(a)(2).

[14] Section 8(a) is further narrowed by a number of unique restrictions, *e.g.*, a small business concern's tenure in the Section 8(a) Program is subject to annual eligibility review and a fixed term of years. *See* 13 C.F.R. §§ 124.110, 124.111. Section 8(a) eligibility tenure is not open-ended.

challenge an individual's presumptive status may be more narrowly drawn than one that allows only the government to do so. The applicable constitutional analysis requires careful consideration of the way race is used, as well as whether the government's objectives could be met with more narrowly drawn regulations. Proper consideration of the questions presented thus requires careful attention to the precise structure of the challenged government program. *See infra* Point II.B.2.

B. The Deficiencies In The Record Preclude Review Of The Questions Presented.

Petitioner has not asked this Court to strike down a particular federal statute or regulatory scheme; it has asked the Court to invalidate the concept of racial preferences in contracting. Nothing in the record, including the opinion of the Court of Appeals, makes clear which of the different regulatory schemes discussed above is at issue in this case. The pleadings and the lower court decisions indiscriminately refer to the Federal Acquisition Regulations, regulations implementing STURAA and regulations implementing the Small Business Act, as if they contained identical regulatory schemes.

Having failed to identify the federal program specifically at issue, petitioner is effectively asking this Court to answer an abstract question about whether race may play a role in subcontracting decisions involving federal contract awards. But such a question should not—indeed cannot—be answered in the abstract. As demonstrated, differences in the various programs may be important to the Court's constitutional analysis, particularly with respect to the "narrow tailoring" inquiry. More fundamentally, because any one of the programs might be at issue, this Court can definitely resolve the case only by affirming or invalidating *all* the programs. That would necessarily result in an advisory opinion with respect to the programs that Gonzales did *not* use to qualify for the subcontract in issue. Even more fundamentally, the record does not indicate whether Gonzales qualified for disadvantaged status by virtue of a presumption, or

whether he proved disadvantage without benefit of a presumption.[15] Thus, it is unclear whether a racial presumption is even at issue.

This record plainly lacks the "reasonable clarity and definiteness" required for adjudication of a constitutional question of this importance. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568, 576 (1947); *see also California Bankers Ass'n v. Shultz*, 416 U.S. 21, 56 (1974). At the most basic level, there may be no case or controversy respecting the use of race. The record contains no finding or even allegation that Gonzales received the benefit of a race-based presumption in qualifying for the award at issue. Absent proof that a racial presumption is at issue, a ruling in this case would be advisory in nature. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968). *See also Poe v. Ullman*, 367 U.S. 497, 501 (1961). Even if jurisdiction were technically present, review would be inappropriate because the record does not indicate which federal program is at issue, and this Court therefore lacks a concrete context for deciding the questions presented. Such prematurity and abstractness present " 'insuperable obstacles' to the exercise of th[is] Court's jurisdiction, even though that jurisdiction is technically present." *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972) (quoting *Rescue Army*, 331 U.S. at 574). This record simply does not "adequately present" the issues raised by petitioner. *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16, 16 (1971).

For these reasons, the writ of certiorari should be dismissed as improvidently granted. *See Commonwealth of*

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[15] Our review of the record indicates that the entire factual basis of petitioner's claim that a racial presumption operated is contained in paragraphs 10 and 11 of the Declaration of Starr Profit, Mountain Gravel's Chief Estimator. *See* Plaintiff's Motion for Summary Judgment, Exhibit E, ¶¶ 10 and 11, *cited in*, Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment at 10. Those paragraphs contain a general assertion that Gonzales was a DBE. They do not identify the program under which he qualified. Nor do they indicate whether he qualified for that program by use of a race-based presumption as opposed to by presenting direct proof of disadvantage.

Massachusetts v. Painten, 389 U.S. 560, 561 (1968); *Williams v. Zuckert*, 371 U.S. 531, 533 (1963).

II. THE SUBCONTRACTING COMPENSATION CLAUSE AND THE REBUTTABLE PRESUMPTIONS COMPORT WITH THE REQUIREMENTS OF THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

A. This Court Should Apply Intermediate Scrutiny In Reviewing The Subcontracting Compensation Clause.

If this Court reaches the merits, it should decline petitioner's invitation to apply strict scrutiny to the challenged programs. For three reasons, the analysis set forth in *Croson*, 488 U.S. 469, has no application here.

First, the programs challenged here differ in critical respects from programs of the kind considered in *Croson*. In *Croson*, the Court held that a local minority set-aside program should be subjected to strict scrutiny because it employed a "rigid rule erecting race as the *sole* criterion in an aspect of public decisionmaking." 488 U.S. at 493 (emphasis added). *Cf. Shaw v. Reno*, 113 S. Ct. 2816 (1993). The federal programs incorporated into the SCC do not set aside government contracting opportunities for a group defined by race or ethnicity. Eligibility depends on social and economic disadvantage. The programs *exclude* individuals in racial and ethnic minority groups who cannot meet the criteria for disadvantage, and *include* individuals not in such groups if they can meet the criteria. To this extent, the programs at issue do not even raise a substantial constitutional issue. As Justice Scalia explained in his separate opinion in *Croson*,

> nothing prevents [government] from according a contracting preference to identified victims of discrimination. While most of the beneficiaries may be black, neither the beneficiaries nor those disadvantaged by the preference would be identified on the basis of their race.

488 U.S. at 526. *See also Fullilove*, 488 U.S. at 535 (Stevens, J., concurring).

To be sure, race is relevant in these federal programs. Although applicants who are not members of minority groups can qualify for contracting preferences without the presumption, an applicant's race may trigger a presumption of social and/or economic disadvantage. *See supra* Point I.A. Those presumptions, however, are rebuttable. Indeed, proof required for an ultimate determination of economic disadvantage is identical for both minority and non-minority applicants: where a minority applicant's presumptive status is questioned, he or she will be required to make the same showing of economic disadvantage as will a non-minority applicant. *See supra* Point I.A. Furthermore, the SCC does not require prime contractors to engage disadvantaged subcontractors, but merely provides additional compensation to those prime contractors who choose to do so.

Nothing in this Court's equal protection decisions requires the application of strict scrutiny to this limited use of race as a rebuttable presumption of disadvantage. In this critical respect, the federal programs under challenge here differ from those at issue in *Croson*, *Fullilove* and *Metro Broadcasting*—all of which granted preferences exclusively on the basis of race or ethnicity. *Fullilove*, 448 U.S. at 453-54; *Croson*, 488 U.S. at 713; *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 557-58 (1990).

Second, where Congress has authorized the use of a race-conscious classification in a program designed to remedy the effects of racial and ethnic discrimination, this Court has applied intermediate scrutiny to assess the constitutional validity of agency rules implementing the details of that program. *See Metro Broadcasting*, 497 U.S. at 463, 565, 566.[16] Indeed, in *Metro Broadcasting*, this Court cited *Croson* as reaffirming "the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to

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[16] Congressional power to authorize such programs is rooted in the enforcement power of Section 5 of the Fourteenth Amendment and in Congress' Spending and Commerce Clause Powers. *See Fullilove*, 448 U.S. at 473-75.

a different standard than such classifications prescribed by state and local governments." *Id.* at 565.

Congress has instructed the President to adopt a government-wide goal for participation of socially and economically disadvantaged businesses in government contracting of *not less than* 5% of the total contracting for each fiscal year, and has instructed each federal agency to adopt goals to give those businesses the "maximum practicable opportunity" to participate in contracts and subcontracts let by the agency. 15 U.S.C. § 644(g)(1). As one means of helping it meet this statutory obligation, DOT's Federal Highway Administration ("FHWA") specifies the use of the SCC in contracts for Construction of Roads and Bridges on Federal Highway Projects. *See* Defendants' Brief in Support of their Motion for Summary Judgment, Exhibit 1, at I-1 and I-24. Intermediate scrutiny applies to this provision because "when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, [it is] 'bound to approach [its] task with appropriate deference to the Congress.'" *Metro Broadcasting*, 497 U.S. at 563.

Third, "Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers . . . under § 5 of the Fourteenth Amendment.'" *Metro Broadcasting*, 497 U.S. at 605 (O'Connor, J., dissenting). That power clearly operates where Congress requires the States to take measures to remedy past discrimination. *See id.* (citing *Fullilove*). If Gonzales obtained SCC DBE eligibility by virtue of its status as a STURAA DBE/MBE, then it is a State's action in certifying Gonzales pursuant to STURAA that is at issue. Through STURAA, Congress *requires* States to follow certain procedures in determining the eligibility of small businesses for preferences. STURAA, Pub. L. No. 100-17, § 106(c)(4), 101 Stat. 132, 146. This case is therefore indistinguishable from *Fullilove* insofar as it examines a presumption contained in STURAA and applied by a State. Moreover, Sections 8(a) and 8(d)

ameliorate the effects of past discrimination by state and local governments, *see infra* note 22 and accompanying text, thereby resting on Congress' Section 5 power to cure state and local violations of the Equal Protection Clause. Whether Congress chooses a federal or state agency as the instrument for administration of its remedial programs should not be dispositive of the applicable standard of scrutiny. Congress' Section 5 authority under the Fourteenth Amendment gives Congress unique power that is subject only to intermediate scrutiny.

B. Federal Contracting Programs For Socially And Economically Disadvantaged Individuals Satisfy Any Applicable Standard Of Equal Protection Review.

Petitioner's constitutional challenge should be rejected irrespective of what standard of review this Court applies. First, the compelling nature of Congress' purpose, *i.e.*, to remedy the effects of a pattern of discrimination in federal contracting, is evident from the legislative history of the Small Business Act and from nationwide disparity studies conducted in the wake of this Court's decision in *Croson*. Second, Congress' use of race is narrowly tailored to avoid the risk of stereotyping because it is neither underinclusive nor overinclusive: race is neither a necessary nor a sufficient condition for securing the preferred status. Moreover, legislative history and agency data establish a clear nexus between the chosen policy and the Congressional objectives.

1. *Congress had ample evidence upon which to base its findings of discrimination in government contracting.*

The SCC and the eligibility provisions incorporated therein are "justified as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress." *Fullilove*, 448 U.S. at 496 (Powell, J., concurring). Because Congress has the authority to prohibit discriminatory practices and "prescribe remedies to eradicate their

continuing effects," *id.* at 502, the issue of whether Congress' asserted interest is compelling must focus on whether Congress has made sufficient findings to support its determination of discrimination. *Id.* In *Fullilove*, this Court examined the adequacy of Congress' findings of extensive discrimination against minority businesses in government contracting in reviewing the mandatory race-based preference that accompanied federal money designated for use in local public works projects. *Id.* at 453, 502. In that examination, the Court looked to the legislative history of the Small Business Act. *Id.* at 463-67, 502-06. Applying strict scrutiny, Justice Powell concluded that:

> A court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received. . . . Although the discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudication, it must be remembered that Congress may paint with a much broader brush than may this Court.

Fullilove, 448 U.S. at 506 (internal quotation omitted). As of 1977, then, this Court had determined that Congress "had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Fullilove*, 448 U.S. at 478 (Burger, C.J.). This conclusion applies with even greater force to this case because the Small Business Act is directly at issue here.

Between 1977 and the 1978 and 1988 amendments to the Small Business Act that formed the current 15 U.S.C. § 644(g), Pub. L. No. 95-507 and Pub. L. No. 100-656, Congress continued to collect evidence of discrimination in federal contracting against disadvantaged and minority business. For example, in debates Senator Glenn pointed to a *Wall Street Journal* article reporting that "the country's 17% minority population controls 4% of

the nation's businesses, and these firms account for less than 1% of total business receipts." 124 CONG. REC. S29641-42 (1978) (debates regarding the amendment of the Small Business Investment Act and the Small Business Act) (statement of Sen. Glenn entering into the record David Gumpert, *Minority-Group Firms Get More Subcontracts Under Federal Projects*, WALL ST. J., Sept. 14, 1978, at 1 & 35).

Congress explicitly set forth a significant government purpose and articulated a need for the goals legislated in Section 644(g). During debates regarding the 1988 amendment of the Small Business Act which resulted in passage of Pub. L. No. 100-656, Congress acknowledged that the Section 8(a) programs had been successful in encouraging greater minority participation in government contracting. 134 CONG. REC. H10052 & H10069 (1988) (statements of Cong. Conte). For example, Congressman Conte reported that "[t]he value of financial packages approved for clients of [the Minority Business Development Administration] increased over 320% between 1983 and 1987" and that "[t]he number of contracts secured increased more than 350% from 1983 to 1987." 134 CONG. REC. H10068 (1988) (statement of Cong. Conte). However, Congressman Conte also pointed out existing disparities between availability and utilization in government contracting, even prior to this Court's decision in *Croson*. Conte told the Conference Committee that there were "more than enough small disadvantaged businesses available to help DOD fulfill its 5-percent goal without kiting the size standards. Parren Mitchell stated at our subcommittee hearing that there are enough minority businesses available to serve 20 percent of all government contracting." 133 CONG. REC. H10774 (1987). However, he noted that this availability had not been fully utilized by DOD in the past. *Id.*[17]

There is no evidence that the problem has been cured. On the contrary, Congress has continued to enhance the

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[17] Congress codified its findings in support of Pub. L. No. 100-656 at 15 U.S.C. § 631(f)(1).

8(a) program through scrutiny and reassessment.[18] As recently as November 29, 1994, Congress updated its record on the continuing effects of marketplace discrimination on small businesses owned by minorities and women.[19] On that date, the House Committee on Government Operations reported that "minorities have had fewer opportunities to develop business skills and attitudes, to obtain necessary resources, and to gain experience, which is necessary for the success of small businesses in a competitive environment. This lack of opportunity occurs primarily because of discriminatory or economic conditions." *Id.* at 5.[20]

Moreover, as a consequence of the *Croson* decision, a national body of evidence establishing the continuing need for preferences has developed.[21] Almost every major city

[18] This Court is not restricted to examining the legislative history of Section 644(g), rather, it "properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises." *Fullilove*, 448 U.S. at 503.

[19] *See Problems Facing Minority and Women-Owned Small Businesses, Including SBA Section 8(A) Firms, in Procuring U.S. Government Contracts: An Interim Report.* H.R. Rep. No. 870, 103d Congress, 2d Session at 5-8, 14-16.

[20] *See also id.* at 15 (noting that "there is underlying discrimination against new entrants into the construction field. This is because bonding firms owned by several generations of the same families seem to predominate; and such firms tend to give performance and payment bonds to people they already know and not to the new business person, especially if the small business owner is a woman or of a racial or ethnic minority.").

[21] Evidence similar to that compiled in these disparity studies, *see infra* note 22, was presented to Congress in the following hearings: *The Meaning and Significance for Minority Businesses of the Supreme Court Decision in the City of Richmond v. J. A. Croson Co.: Hearing before the Legislation and National Security Subcommittee of the Committee on Government Operations, House of Representatives*, 101st Cong., 2d Sess. (1990); *To Amend the Civil Rights Act of 1964: Permitting Minority Set-Asides: Hearing before the Committee on Governmental Affairs, United States Senate*, S. Hrg. 933, 101st Cong., 2d Sess. (1990); *City of Richmond*

in the nation has by now conducted a "*Croson* study."[22] These studies invariably find significant statistical disparities between minority business availability and utilization

v. J. A. Croson: Impact Response: Hearing before the Subcommittee on Urban and Minority-Owned Business Development of the Committee on Small Business, United States Senate, S. Hrg. 1280, 101st Cong., 2d Sess. (1990).

Testimony was presented at these hearings by minority business owners from diverse regions of the country in various categories of business including construction, goods, and services. Witness testimony uniformly reflected ongoing marketplace discrimination and heightened barriers and denial of market access as a direct result of the dismantling of affirmative action remedies in the wake of the *Croson* decision.

[22] *See, e.g.*, the following State, municipal, and county studies: National Economic Research Associates, Inc., The Utilization of Minority and Women-Owned Business Enterprises by Alameda County, Final Report (June 1992) [hereinafter Alameda Study]; Research & Evaluation Associates, Inc., Minority Business Disparity Study to Support City of Ashville Minority Business Plan, Final Report (October 29, 1993) [hereinafter Ashville Study]; Brimmer & Marshall, Public Policy & Promotion of Minority Economic Development, Parts I-VIII (June 29, 1990); Thomas D. Boston, PhD., Unequal Access: Minority Contracting and Procurement with the Atlanta Board of Education (August 8, 1991); Profs. Michael A. Millemann & Maxwell Chibandu, Public Comment Draft Report of the Task Force to Study the Constitutionality of the Baltimore City MBE and WBE Program (November 8, 1989); D.J. Miller & Associates, City of Charlotte MWBE Disparity Study (October 1933); The Blue Ribbon Panel (Susan Getzendanner, Ruben Castillo, and Milton Davis), Report on Minority Set-Asides in Chicago (March 29, 1990) [hereinafter Chicago Study]; Board of Education of the City of Chicago, Report Concerning Consideration and Adoption of the Revised Remedial Plan for Minority and Women Business Enterprise Economic Participation (January 30, 1991); Institute for Policy Research, University of Cincinnati, City of Cincinnati Croson Study (April 17, 1992); Minority Business Enterprise Legal Defense & Education Fund and BBC, Inc., Predicate Study: City of Columbus, Ohio (August 1992); Henderson Hyman & Howard Associates, The New Connecticut: Toward Equal Opportunity in State Contracting, Final Report (August 31, 1992); National Economic Research Associates, Inc., The Utilization of Minority and Women-Owned Business Enterprises by Contra Costa County, Final Report (May, 1992); Dade County Public School Board, Minority Business

in contracting, as well as particularized anecdotal evidence of discrimination, as required by *Croson*. 488 U.S.

Enterprises Utilization Study Recommendations and Administrative Responses (April 24, 1991); D.J. Miller & Associates, City of Dayton Disparity Study (March 1991); Harding & Ogborn, Browne, Bortz & Coddington, Inc., and Minority Business & Professional Directory, Inc., Denver Disparity Study: Construction & Professional Design Services, Final Report (June 22, 1990) [hereinafter Denver Study]; Minority Business Enterprise Legal Defense & Education Fund, Inc., An Examination of Marketplace Discrimination in Durham County, Preliminary Report (July 1, 1991); TEM Associates, Inc., State of Florida Minority/Women Business Study (December 1990); BBC, Inc., Disparity Study: City of Fort Worth (November 1993); North Carolina Institute of Minority Economic Development, City of Greensboro Minority and Women Business Enterprise Disparity Study (July 1992); National Economic Research Associates, Inc., The Utilization of Minority and Women-Owned Business Enterprises by the City of Hayward, Final Report (March 1993) [hereinafter Hayward Study]; D.J. Miller & Associates, Hillsborough County Disparity Study (1989); D.J. Miller & Associates, Inc., City of Jacksonville, Disparity Study (November 1990); BBC Research & Consulting and Minority Business Enterprise Legal Defense and Education Fund, Regional Economic Disparity Study, City of Las Vegas (July 1994); D.J. Miller & Associates, State of Louisiana Disparity Study (June 1991); Coopers & Lybrand, Ad Jackson Consultants, Inc., State of Maryland Minority Business Utilization Study, Final Report (March 15, 1990); Ad Jackson Consultants, Inc., Maryland-National Capital Park and Planning Commission, Minority, Female, Disabled Business Utilization Study, Final Report (November 4, 1992); National Economic Research Associates, Inc., Availability and Utilization of Minority and Women-Owned Business Enterprises at the Massachusetts Water Resources Authority, Final Report (November 21, 1990); MRD Consulting, A Minority and Women-Owned Business Discrimination Study Prepared for Metropolitan Dade County, Florida, Parts I-IV (November 29, 1993); Affirmative Action Consulting, Ltd. and Ralph G. Moore & Associates, M/WBE Disparity Study for the County of Milwaukee, City of Milwaukee and Milwaukee Public Schools (April 1992); Minnesota Department of Administration, Management Analysis Division, A Study of Discrimination Against Women- and Minority-owned Businesses (January 1990); Special Committee on Section 12½ Review, New Haven Board of Aldermen, Minority and Women Business Participation in the New Haven Construction Industry (May 23, 1990) [hereinafter New Haven Study]; BBC Research & Consulting, Pima County Disparity Study (June 1994); Xavier

at 492.[23] The thousands of specific anecdotes from minority and women entrepreneurs reflected in these dis-

University of Louisiana Economic Development Center, An Analysis, Critique and Chronicle of the Audobon Park Commission Minority Business Enterprise Plan for Construction of the Aquarium and Riverfront Park (October 1990); National Economic Research Associates, Inc., The Utilization of Minority and Woman-Owned Business Enterprises by the City of New York (January 24, 1992) [hereinafter New York City Study]; Division of Minority and Women's Business Development of the Department of Economic Development, Opportunity Denied! A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State (Spring 1992); MGT of America, Inc. and Research and Evaluation Associates, Inc., State of North Carolina Study of Minority and Women Business Participation in Highway Construction (January 26, 1993); D.J. Miller & Associates, Disparity Study for the Orange County, Florida Consortium (February 24, 1993); BBC, Inc., Disparity Study: City of Phoenix (July 1993) [hereinafter Phoenix Study]; Minority Business Enterprise Legal Defense and Education Fund, Inc., An Examination of Prince George's County's Minority Business Program, Parts I-III (February 1991); Mason Tillman Associates, Sacramento Municipal Utility District M/WBE Disparity Study (October 1992); D.J. Miller & Associates, City of St. Petersburg Disparity Study (June 1990) [hereinafter St. Petersburg Study]; BPA Economics, Inc., Statistical Support for San Francisco's MBE/WBE/LBE Ordinance (May 1, 1989); BPA Economics, Mason Tillman Associates, and Boasberg & Norton, MBE/WBE Disparity Study for the City of San Jose, Final Report (1990); The Washington Consulting Group, Inc., Study of Minority/Women Business Participation in Purchasing and Concessions (July 9, 1990); National Economic Research Associates, Inc. and Portfolio Associates, Inc., The Utilization of Minority and Woman-Owned Business Enterprises by the Southeastern Pennsylvania Transportation Authority, Final Report (September 29, 1993); Knowledge Systems and Research, Inc., City of Syracuse Report on Local Public Works Contracting (January 1991); MGT of America, Inc., City of Tallahassee MBE Disparity Fact-Finding Study, Final Report (January 11, 1990); BBC Research & Consulting, The City of Tucson Disparity Study (June 3, 1994); National Economic Research Associates, Inc., Availability and Utilization of Minority and Women-Owned Business Enterprises at the Metropolitan Washington Airports Authority (February 14, 1990).

[23] In the rare case where no availability/utilization disparity was discovered, the authors attributed their findings to very low avail-

parity studies portray a serious pattern of discrimination across all regions of this nation and across all categories of industry. Manifestations of discrimination have typically included such forms as denials of opportunities to bid, unfair denials of contract awards, double standards in performance, unequal access to financing, and price discrimination by suppliers.

The disparity study commissioned by the City of Denver, Colorado is particularly comprehensive. *See* Denver Study, *supra* note 22. The Denver study examined all facets of the construction industry and analyzes disparities for each minority sought to be protected by the City's program. The study focused on the development and compilation of potential evidence of discrimination in the Denver construction and professional design industries. *Id.* at I-2 to I-4. Not only did the study find significant statistical disparities on projects where no MBE goals applied, it also found that minority construction firm availability was suppressed, given the number of minorities working in the industry. *Id.* at VI-4, VIII-2 and App. C. The study concluded:

> Overall, there is strong evidence of discrimination against MBEs and WBEs in the construction industry. . . .
>
> Evidence of discrimination was found for four groups within the minority construction and professional design industries. There was substantial evidence of discrimination against Hispanics, somewhat less evidence against Blacks and less against Asians and Native American Indians. . . . Because of the pervasiveness of racial discrimination, and because of the evidence of discrimination against each minority group, we conclude there exists race-based discrimination against all four minority groups in both construction and professional design.

Id. at VIII-8.

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ability of minority businesses, also caused by systemic discrimination. *See, e.g.*, St. Petersburg Study, *supra* note 22.

Similarly, a 1993 study in Ashville, North Carolina found evidence of discrimination in contracting and procurement activities. Ashville Study, *supra* note 22, at xix. During the eight years examined in construction contracting, white male-owned businesses received 99.1% of the $52,235,352.00 expended on construction contracts and subcontracts. *Id.* at xi. Moreover, the study concluded that utilization of African American firms averaged only 0.34% of construction dollars available, though African American firms constituted 2.28% of available construction firms. *Id.*

In Hayward, California, a 1993 study of contracting in that city found the following dollar utilization of MBEs as a percentage of availability for prime contracting: African Americans—2%; Asian Americans—7%; Hispanic Americans—8%; and Women—18%. Hayward Study, *supra* note 22, at Tbl. A, 1. The disparities in Phoenix, Arizona are similar. In 1987, the average black-owned firm received $55,195 in revenues by contracting with the Phoenix city government, while the average majority firm received $181,230. Phoenix Study, *supra* note 22, at VII-2. Census data from 1987 showed that minority businesses represented 5.80% of the market. However, in the period between 1987 and 1992, minority-owned businesses received only 1.91% of the City's purchase dollars, while majority-owned businesses received 96.25%. *Id.* at V-3.

A study in New Haven, Connecticut found a "long entrenched and widespread pattern of racial and gender discrimination in the construction industry in New Haven." New Haven Study, *supra* note 22, at 28. In 1987, blacks owned 6%, hispanics 0.5%, and women 3% of the construction firms in New Haven. However, based on Equal Employment Opportunities Commission Data for Connecticut showing percentages of construction employees in the State, in the absence of discriminatory barriers, blacks should own 10%, hispanics 5% and women 6% of the construction firms in the area. *Id.* at 19.

In New York City, a study calculating disparity ratios for each minority group that receives contracting preferences found that M/WBEs received a substantially smaller share of the dollars spent by New York City in 1989 and 1990 than would be expected given the availability of M/WBEs in the geographic market from which the City procures goods and services. New York City Study, *supra* note 22, at x. For example, African Americans received only 17 cents of every dollar they should have received based on their availability as prime contractors and only 68 cents of every dollar as subcontractors. *Id.* The study also found that discrimination is especially "virulent" in the construction industry, and that African Americans encounter the most frequent and severe discrimination. *Id.* at xi.

This significant and persuasive evidence of a national pattern or practice of discrimination in government contracting supports both the adoption and the continued use of the SCC and the federal programs incorporated therein. Congress perceived a compelling governmental interest and enacted legislation to remedy the systemic disadvantages experienced by minority business. The evidence available in the legislative history and subsequent empirical studies establishes that the need for federal action remains compelling. *See generally Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. at 2472 (acts of Congress must be upheld if justified by either "evidence on which Congress relied, or . . . additional evidence" validating Congress' judgment).

2. ***Congressional authorization of DOT's use of the SCC and of the federal programs incorporated therein is necessary to accomplish and narrowly tailored to further the compelling governmental interest.***

Narrow tailoring ensures "that the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Metro Broadcasting*, 497 U.S. at 617 (O'Connor, J., dissenting) (quoting *Croson*, 488 U.S. at 493). In *Metro Broadcasting*, Justice O'Connor expressed concern that the direct link drawn by the FCC between race and distinct viewpoints demonstrated that the means chosen to promote broadcast diversity were based on stereotyping. *Metro Broadcasting*, 497 U.S. at 617. In this case, however, race is neither a necessary nor a sufficient condition of securing the preference. *Id.* The SCC and the federal programs do not equate a particular race with disadvantage, but instead acknowledge that individuals of any race may experience prejudice or bias that may result in social and economic disadvantage.

The SCC and the federal programs' preference eligibility provisions are narrowly tailored. Disadvantage is the basis for classification: race does not serve as its proxy. *See Metro Broadcasting*, 497 U.S. at 621 (O'Connor, J., dissenting). Both minority and non-minority individuals may establish eligibility for the preference. Members of named minority groups have the benefit of a rebuttable presumption of disadvantage, but if that status is questioned, they are subject to the same requirements of proof of economic disadvantage as are non-named minority group members. *See supra* Point I.A. Non-disadvantaged and large minority businesses are excluded from this preference, and small disadvantaged non-minority businesses can receive its benefits.[24]

Although "the Government cannot employ race classifications that unduly burden individuals who are not members of the favored racial and ethnic groups," *Metro Broadcasting*, 497 U.S. at 630 (O'Connor, J., dissenting); 497 U.S. at 597-98, the burden suffered by non-minorities in this case is limited to the requirement that they prove their disadvantaged status without the benefit of the evidentiary presumption to that effect. No specialized market has been created and reserved for minority-owned businesses, and the opportunity to compete for subcontracts

[24] Adarand apparently never challenged the disadvantaged status of Gonzales.

falling within the SCC does not "depend[] entirely upon race or ethnicity." *Id.* at 630.[25] Even the scope of the market that has been targeted for the benefit of disadvantaged businesses is fluid: only goals, not quotas are to be set by DOT for participation of disadvantaged business in DOT contracting and subcontracting;[26] and only an *incentive payment* based on voluntary use of disadvantaged businesses by prime contractors is included in the SCC. *See* 497 U.S. at 630-31.

The Small Business Act sets a nationwide *goal* for disadvantaged business participation in federal contracting of "no less than 5%." 15 U.S.C. § 644(g). DOT is required to set goals for itself that present the "maximum practicable opportunity" for disadvantaged business participation in DOT contracting. *Id.* The figure that is operational in this case, however, is the 10% goal in the SCC: contractors may *choose* to use disadvantaged businesses for subcontracting in an amount of at least 10% of the total value of the contract in order to make themselves eligible for additional compensation.[27] A goal of

[25] If a market has been reserved for a class, it is a class of disadvantaged businesses. A classification of that nature only need survive this Court's rational basis scrutiny.

Even that market has not been reserved, however. It is not true that all dollars spent by the Federal government in fulfillment of federal contracting goals are restricted to race-based contractor recipients. Under SBA's Section 8(a) program, the Section 8(d) program, and STURAA, small disadvantaged businesses are permitted to subcontract or joint venture with nondisadvantaged firms, provided the disadvantaged business is not "fronting" for the nondisadvantaged firm. *See, e.g.*, 13 C.F.R. §§ 124.314, 124.321. Just as a firm such as Mountain Gravel awarded a subcontract to Gonzales, firms such as Gonzales subcontract to firms like Adarand. Disadvantaged business awards are not a closed fund in which nondisadvantaged businesses do not participate.

[26] *See* 15 U.S.C. § 644(g).

[27] The 12-15% goal for disadvantaged business participation that CFLHD set for itself to help DOT meet its overall goals is simply not operative in this case. It has no effect on the SCC: DOT's FHWA distributes the specifications for contracts relating to highway construction and CFLHD simply incorporates that specified provision in its contracts.

10% is reasonable and narrowly drawn. A 10% *set-aside* was upheld in *Fullilove* in part because it included a waiver provision that prevented rigid application of the set-aside in areas of the country where minority population might be low. 448 U.S. at 513-14.[28] The preference in this case is even more narrowly drawn because it is *not* a set-aside, but is, instead, a voluntary option that contractors may take or leave as they please.

Moreover, the nexus between the chosen policy and the asserted interest is demonstrated here by the direct relationship between preference programs for disadvantaged businesses and the level of utilization of those businesses. In addition to the legislative history and the *Croson* disparity studies, federal agency data suggests that disadvantaged business participation rates would have remained inequitably low in the absence of an 8(a) program. Statistics published by the Department of Defense show that dollars awarded to 8(a) businesses increased from $9 million in 1969 to nearly $2.8 billion in 1993. Department of Defense, *Small Disadvantaged Business (SDB) Program History*. From 1969 to 1993, the percentage of DOD total contracting dollars going to all SDBs has increased from 0% to 5.3%. *Id.* These statistics demonstrate the effectiveness of and continuing need for programs ot ameliorate the effects of past discrimination. Without them, those effects will continue to be felt.[29]

[28] The 10% figure is one that Congress has clearly considered appropriate as a goal for disadvantaged business participation in DOT projects. In STURAA, Congress legislated that figure as the goal recipients of DOT highway funds should meet. STURAA, Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 132, 145.

[29] Indeed, as noted in at least one disparity study, absent such programs, disparity will remain: "African American owned MBEs received *none* of the 91 subcontracts issued by Alameda County prime contractors who had received awards during the period when the M/WBE program was suspended." Alameda Study, *supra* note 22, at ix-x. Although the use of the SCC is not explicitly

Finally, as Justice Powell noted in *Fullilove*, in enacting the preference at issue there and in the Small Business Act, Congress

> knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by antidiscrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts.

Fullilove, 448 U.S. at 511 (citing 123 Cong. Rec. 7156 (1977) (remarks of Sen. Brooke)). For these reasons, the SCC and federal eligibility provisions incorporated therein are narrowly drawn so as to survive even this Court's strictest scrutiny.

CONCLUSION

For the reasons stated herein, this Court should either dismiss the writ of certiorari as improvidently granted or affirm the judgment of the Court of Appeals.

Respectfully submitted,

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limited in duration, the continuing need for these programs justifies their operation. STURAA is, of course, merely a fixed term appropriations statute, and the funding at issue in this case expired in 1991. *See* STURAA Pub. L. No. 100-17, § 106(a)(8). Section 8(a) eligibility is limited to a fixed term of years. *See supra* note 14.